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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NOMADIX, INC.,) Case No. CV 09-08441 DDP (VBKx)
)
Plaintiff,) **ORDER GRANTING PLAINTIFF'S MOTION**
) **FOR SUMMARY JUDGMENT OF**
v.) **NONINFRINGEMENT OF U.S. PATENT**
) **NOS. 6,996,073 AND 7,580,376**
)
HEWLETT-PACKARD COMPANY, a) [Docket No. 566]
Delaware corporation;)
WAYPORT, INC., a Delaware)
corporation; IBahn)
CORPORATION, a Delaware)
corporation; GUEST-TEK)
INTERACTIVE ENTERTAINMENT)
LTD., a Canadian)
corporation; GUEST-TEK)
INTERACTIVE ENTERTAINMENT,)
INC.; a California)
corporation; LODGENET)
INTERACTIVE CORPORATION, a)
Delaware corporation;)
LODGENET STAYONLINE, INC., a)
Delaware corporation; ARUBA)
NETWORKS, INC.; a Delaware)
corporation; SUPERCLICK,)
INC., A Washington)
corporation; SUPERCLICK)
NETWORKS, INC., a Canadian)
corporation,)
Defendants.)

1 Presently before the court is Plaintiff Nomadix, Inc.'s Motion
2 for Summary Judgment of Noninfringement of U.S. Patent Nos.
3 6,996,073 and 7,580,376 ("Motion"). Having reviewed the parties'
4 moving papers and heard oral argument, the court grants the Motion
5 and adopts the following Order.

6 **I. BACKGROUND**

7 As Counterclaim-Defendant, Nomadix, Inc. ("Nomadix") seeks
8 summary judgment that the operation of its accused gateways do not
9 infringe U.S. Patent Nos. 6,996,073 ("`073 Patent") and 7,580,376
10 ("`376 Patent") (collectively, "Patents"), held by Counterclaim-
11 Plaintiffs iBAHN Corporation and iBAHN General Holdings Corporation
12 (collectively, "iBAHN"). Nomadix argues that it is entitled to
13 summary judgment of noninfringement because its gateways do not
14 "provid[e] content or conference services on a network, and
15 restrict[] access to the content or conference services to selected
16 users" ("providing" and "restricting" limitations, respectively).
17 (Mot. at 1.) There is no dispute that these steps are required by
18 all claims of the two Patents at issue.¹ iBAHN contends that the
19 Motion should be denied, however, because Nomadix's gateways do
20 meet these providing and restricting limitations. At the least,
21 iBAHN argues, Nomadix has failed to show that there is no genuine
22 issue of material fact. (Opp'n at 2; Sur-Reply at 1.²)

23
24 ¹ Because the court declined to construe any of the relevant
25 terms, their ordinary meaning applies. See Phillips v. AWH Corp.,
26 415 F.3d 1303, 1312 (Fed. Cir. 2005) ("[T]he words of a claim are
generally given their ordinary and customary meaning." (internal
quotation marks omitted)).

27 ² On November 28, 2011, iBAHN filed an Ex Parte Application
28 for Leave to File a Sur-Reply in Opposition to Nomadix's Motion.
The court took the Application under submission. Having reviewed
(continued...)

1 **II. LEGAL STANDARD**

2 Summary judgment is appropriate where "the movant shows that
3 there is no genuine dispute as to any material fact and the movant
4 is entitled to a judgment as a matter of law." Fed. R. Civ. P.
5 56(a). Material facts are those "that might affect the outcome of
6 the suit under the governing law." Anderson v. Liberty Lobby,
7 Inc., 477 U.S. 242, 248 (1986). A genuine issue of fact exists if
8 "the evidence is such that a reasonable jury could return a verdict
9 for the nonmoving party." Id. The evidence must be viewed in the
10 light most favorable to the nonmoving party, with all justifiable
11 inferences drawn in its favor. Id. at 255.

12 The moving party "always bears the initial responsibility of
13 informing the district court of the basis for its motion," and
14 identifying those portions of the pleadings, discovery, and
15 affidavits that demonstrate the absence of a genuine issue of
16 material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).
17 However, "[o]n an issue for which the opposing party will have the
18 burden of proof at trial, the moving party need only point out
19 'that there is an absence of evidence to support the nonmoving
20 party's case.'" Regents of Univ. of Cal. v. Dako N. Am., Inc., No.
21 C 05-03955, 2009 WL 1083446, at *5 (N.D. Cal. Apr. 22, 2009)
22 (quoting Celotex, 477 U.S. at 325).

23 Once the moving party meets this initial burden, "the
24 nonmoving party must go beyond the pleadings and, by its own
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26 ²(...continued)
27 the parties' moving papers, the court is not convinced that Nomadix
28 raised any new arguments in its Reply, as iBAHN contends.
Nonetheless, in the interest of having a complete record, the court
will consider iBAHN's Sur-Reply.

1 affidavits or discovery, 'set forth specific facts showing that
2 there is a genuine issue for trial.'" Regents, 2009 WL 1083446, at
3 *5 (quoting Fed. R. Civ. P. 56(e)). It is not enough for the
4 nonmoving party to rest on the "mere allegations or denials of his
5 pleadings." Anderson, 477 U.S. at 259; see also id. at 252 ("The
6 mere existence of a scintilla of evidence in support of the
7 plaintiff's position will be insufficient.").

8 **III. DISCUSSION**

9 In this patent case, iBAHN "bears the burden of proving
10 infringement by a preponderance of the evidence." Warner-Lambert
11 Co. v. Teva Pharm. USA, Inc., 418 F.3d 1326, 1342 (Fed. Cir. 2005).
12 "Direct infringement requires a party to perform or use each and
13 every step or element of a claimed method or product." BMC Res.,
14 Inc. v. Paymentech, L.P., 498 F.3d 1373, 1378 (Fed. Cir. 2007).
15 "An accused device cannot infringe, as a matter of law, if even a
16 single limitation is not satisfied." Digital Biometrics v.
17 Identix, Inc., 149 F.3d 1335, 1349 (Fed. Cir. 1998).

18 In its Motion, Nomadix has pointed to an absence of evidence
19 in support of the providing and restricting limitations of iBAHN's
20 asserted claims. Nomadix has therefore met its initial summary
21 judgment burden. In response, iBAHN cites to the following
22 materials: 1) Dr. Robert Printis' Declaration in Support of iBAHN's
23 Opposition ("Printis Declaration"); 2) Dr. Printis' Supplemental
24 Declaration in Support of iBAHN's Opposition ("Supplemental Printis
25 Declaration"); 3) iBAHN's Second Amended Infringement Contentions
26 ("Contentions"); and 4) a document titled "Nomadix, Inc. Network
27 Service Engine (NSE) Architecture and Module" ("Nomadix Product
28 Document").

1 The court finds, however, that none of these materials are
2 sufficient to create a genuine issue of material fact as to the
3 restricting limitation in iBAHN's claims. Nomadix is therefore
4 entitled to summary judgment of noninfringement on the Patents.

5 **A. Printis Declarations**

6 In his Declaration, Dr. Printis states that he understands the
7 Patents and has reviewed the relevant source code. (Printis Decl.
8 ¶¶ 5-6.) He also states that he is familiar with Nomadix's Group
9 Account and Realm Based Routing features, and has run tests to
10 verify their operation. (Id. ¶¶ 8, 12.) He then states, without
11 any analysis, that he disagrees with Nomadix's claim that these
12 features do not restrict access to content or conference services
13 ("content/services") to particular users, because they can in fact
14 be configured to do so. (Id. ¶¶ 9-10, 13-14.)

15 Dr. Printis then briefly describes two hypothetical scenarios
16 ostensibly confirming this contention. First, with regard to
17 Nomadix's Group Account feature, Dr. Printis describes a
18 hypothetical "Macworld Expo" conference. He states that the
19 conference hosts could create a "MacworldUsers" group account, and
20 that only this group would have access to the content/services
21 provided by Nomadix. (Id. ¶ 11.) Second, as to Realm Based
22 Routing, Dr. Printis describes a hypothetical involving a
23 "group.google.com" realm name. He states that a user named
24 "user@group.google.com" would be able to access content/services on
25 a "group.google.com" server, while a user named "otheruser@msn.com"
26 would be restricted from accessing the server. (Id. ¶ 15.)
27 Finally, Dr. Printis states that he has reviewed the Nomadix
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1 Product Document, and understands it to mean that access can be
2 restricted through Realm Based Routing. (Id. ¶ 16.)

3 The court finds that Dr. Printis' Declaration is too
4 conclusory to create a genuine issue of material fact as to the
5 restricting limitation. To avoid summary judgment, a patentee must
6 provide "[e]vidence from which a reasonable fact-finder could find
7 infringement." Novartis Corp. v. Ben Venue Labs., Inc., 271 F.3d
8 1043, 1050-51 (Fed. Cir. 2001). However, a patentee "does not meet
9 this evidentiary threshold merely by submitting the affidavit of an
10 expert who opines that the accused device meets the claim
11 limitations." Id. at 1051. Rather, the "expert must set forth the
12 factual foundation" for his or her opinion "in sufficient detail
13 for the court to determine whether that factual foundation would
14 support a finding of noninfringement." Id. (internal quotation
15 marks omitted).

16 Here, prior to opining that Nomadix's Group Account and Realm
17 Based Routing features meet the restricting limitation, Dr. Printis
18 simply states that he has reviewed the relevant source code and run
19 tests. Dr. Printis does not provide even a brief explanation of
20 how the source code functions, or any description of the tests he
21 performed. Nor does Dr. Printis cite to any specific product
22 configurations or tests confirming his hypotheticals.

23 Indeed, the conclusory nature of Dr. Printis' hypotheticals is
24 made clear by Vadim Olshansky's Supplemental Declaration in Support
25 of Nomadix's Motion ("Olshansky Declaration"). In his Declaration,
26 Olshansky describes in detail product configurations and tests,
27 allegedly complying fully with Dr. Printis' hypotheticals, where
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1 content/service access is not restricted to selected users.
2 (Olshansky Decl. ¶¶ 11-26, 39-56.) In its Sur-Reply, iBAHN makes
3 the accurate theoretical point that: just "because [Nomadix's]
4 gateways can be configured such that [the features] do[] not
5 restrict access to certain users," does not mean that no
6 configuration restricts access. (Sur-Reply at 2.) iBAHN also
7 argues that Nomadix excluded an important part of the Realm Based
8 Routing configuration from its tests. iBAHN, however, never moves
9 beyond these theoretical and practical objections to Nomadix's
10 detailed configurations and tests, to describe with any specificity
11 a configuration or test that would satisfy the claims limitation.
12 Instead, in his one-page Supplemental Declaration, Dr. Printis
13 again makes only conclusory allegations.³ Thus, the court is left
14 with nothing more than two undetailed hypotheticals that - at least
15 in their generalized form - are indisputably incorrect.⁴

16
17 ³ In relevant part, Dr. Printis states that: "Nomadix's test
18 ignores that its gateways have the option to associate a realm
19 routing policy with a RADIUS profile or a tunneling profile. A
20 RADIUS profile or a tunneling profile requires that a user be
21 authorized in order to have access to the content or services with
22 which the profile is associated. Thus, through a realm routing
policy and its associated RADIUS or tunneling profile, a Nomadix
gateway restricts access to content or services to only members of
a particular realm." (Id. ¶¶ 3-4.) Notably, Dr. Printis does not
describe any particular "RADIUS or tunneling profile" that would
restrict access, or discuss any confirming tests.

23 ⁴ Although the court need not reach the issue, Nomadix also
24 argues persuasively that Dr. Printis' Group Account hypothetical
25 would not satisfy the restricting limitation, even if it were true.
26 Specifically, Dr. Printis' hypothetical involves configuring a
27 Nomadix gateway "to have only one group account . . . and no other
accounts." (Printis Decl. ¶¶ 11-12.) Thus, access is only
restricted to the group account users because there are no other
users. But as iBAHN concedes, the Patents "require that access be
restricted to . . . a subset of users" (Sur-Reply at 4 (emphasis
added) - specifically, a subset of the "plurality of users

(continued...)

1 **B. Infringement Contentions**

2 iBAHN also argues that its Infringement Contentions create a
3 genuine issue as to the restricting limitation, because the
4 Contentions cite to Nomadix technical documents and source code
5 confirming that its products restrict access to selected users.
6 The Contentions, however, are not themselves evidence; they are
7 written by attorneys, and not based on personal knowledge or signed
8 under penalty of perjury. See Kimberly-Clark Worldwide, Inc. v.
9 First Quality Baby Prods., LLC, No. 1:CV-09-1685, 2010 WL 4537002,
10 at *2 (M.D. Pa. 2010) ("[I]nfringement contentions provide notice
11 of the accusing party's specific infringement theories, and are not
12 considered evidence."). Nor are the alleged technical documents
13 and source code cited therein authenticated in the usual manner.
14 See Corkill v. Preferred Employers Group, LLC, No. 11cv505, 2011 WL
15 5975678, at *4 (S.D. Cal. 2011) ("Generally, on a motion for
16 summary judgment, a document is authenticated through personal
17 knowledge by attaching it to an affidavit, where the affiant is a
18 competent witness who wrote the document, signed it, used it, or
19 saw others do so.").

20 _____
21 ⁴(...continued)
22 associated []with" the network. ('073 Patent at 15:55-65; '376
23 Patent at 15:35-45.) iBAHN argues, however, that the court refused
24 to construe this limitation as requiring that the broader set of
25 users "have been granted access to the network." (Claim Constr.
26 Order at 17-18.) But in rejecting Nomadix's proposed construction,
27 the court simply left the limitation with its ordinary meaning. At
28 a minimum, restricting access to selected users from "a plurality
of users associated []with" the network must mean that there are
multiple user accounts on the network. As Nomadix reasonably
argues, iBAHN's Patents would otherwise likely "sweep in a large
category of new prior art," by covering "a simple network that
supports only one username and password to be used by all users,
and that denies access to anyone who does not use that username and
password." (Reply at 13.)

1 There are, of course, other ways to authenticate evidence.
2 For instance, under Federal Rule of Evidence 901(b)(4), an item can
3 be authenticated by its "appearance, contents, substance, internal
4 patterns, or other distinctive characteristics." See also Corkill,
5 2011 WL 5975678, at *4 (discussing this method of authentication).
6 Here, however, iBAHN cites broadly to its Contentions, without
7 asking the court to authenticate specific supporting documents, or
8 suggesting any basis for doing so. (See, e.g., Opp'n at 5
9 (alleging that "iBAHN has provided in its [Contentions] citations
10 to Nomadix documents and source code that show the Nomadix accused
11 products do in fact 'restrict access'"); Sur-Reply at 2 ("In its
12 [Contentions], iBAHN cited to actual tests run on a Nomadix
13 gateway, Nomadix's own documentation, as well as Nomadix's source
14 code as evidence").) The court will not scour through the
15 exhibits to the Contentions to determine whether any might be
16 properly authenticated and create a genuine issue of material fact.
17 See Green v. Seattle Art Museum, No. C07-0058, 2008 WL 2180144, at
18 *2 (W.D. Wash. 2008) ("The district court is not obligated to
19 search the record for material facts").

20 **C. Nomadix Product Document**

21 Finally, iBAHN cites to one specific Nomadix Product Document,
22 which states that: 1) "Realm-Based Routing is a feature that
23 supports roaming NSE subscribers, by allowing them to obtain
24 certain types of services from servers in their 'home' network,
25 i.e., from within the subscriber's realm"; and 2) realm routing
26 policies "basically have the meaning 'If the realm name contained
27 within a user id matches the criteria in this policy, then use the
28

1 specified profile in deciding where to obtain the service.'"
2 (Nomadix Prod. Doc. at NMDX0238764.) Contrary to iBAHN's argument,
3 without any admissible interpretation of these statements, it would
4 not be reasonable to conclude that deciding "where" to obtain a
5 service is the same as "restricting access" to that service.

6 **IV. CONCLUSION**

7 In sum, iBAHN provides no evidence sufficient to establish a
8 genuine issue of material fact as to whether Nomadix's products
9 satisfy the restricting limitation of iBAHN's Patents. Nor does
10 iBAHN make any argument that Nomadix's products somehow satisfy
11 this claims limitation through the doctrine of equivalents. For
12 all these reasons, the court grants Nomadix's Motion for Summary
13 Judgment of Noninfringement as to the '073 and '376 Patents.

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IT IS SO ORDERED.

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Dated: January 17, 2012

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DEAN D. PREGERSON
United States District Judge